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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

JOAN G. LOZOYA, Plaintiff, v. ERIC J. ANDERSON, M.D.; LINDSY BLAKE, M.D.; HOSPITAL CORPORATION OF AMERICA, INC.; MOUNTAIN VIEW HOSPITAL; FREEMONT EMERGENCY SERVICE, INC.; ALEXANDRA E. PAGE, M.D.; KAISER FOUNDATION HEALTH PLAN, INC.; KAISER PERMANENTE and DOES 1 through 30, inclusive, Defendant(s).	CASE NO. 07CV-2148IEG (WMC) **PLAINTIFF'S *OPPOSITION* TO DEFENDANTS, HEALTH CORP AND MOUNTAIN VIEW'S MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF** Date: June 2, 2008 Time: 10:30 a.m. Room: Courtroom 1

TO ALL PARTIES AND THEIR RESPECTIVE ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on June 2, 2008, at 10:30 a.m. in Courtroom 1 of the above entitled court located at 940 Front Street, San Diego, California, Plaintiff, JOAN G. LOZOYA, hereby **Opposes** the Defendant, Health Corporation of America, Inc. and Mountain View Hospital's Motion to Dismiss pursuant to F.R.C.P.12(b)(6).

This Opposition is made and based upon the Memorandum of Points and Authorities in support thereof, the pleadings and files involved in this case and incorporated herein by reference, and upon such further oral and documentary evidence as may be made at the time of the hearing of this matter.

Respectfully Submitted.

Dated: May 15, 2008

LAW OFFICES OF LOZOYA & LOZOYA

S/Frank J. Lozoya IV, Esq.

FRANK J. LOZOYA IV
Attorneys for Plaintiff,
JOAN G. LOZOYA

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

On or about November 8, 2006, Plaintiff, JOAN G. LOZOYA, was injured in a fall and was transported by ambulance to MOUNTAIN VIEW HOSPITAL for emergency medical attention. Upon arriving at MOUNTAIN VIEW HOSPITAL, Plaintiff was seen by emergency room physician Defendant, Eric J. Anderson, M.D. Radiologist, LINDSY BLAKE, M.D. took a single AP view of Plaintiff's right shoulder. The film revealed a massive and serious right proximal humerus fracture. The humerus showed a communicated fracture of the right humeral head and surgical neck and a distal fracture fragment was displaced medially. Plaintiff, JOAN G. LOZOYA was advised that she had a severe fracture of her right shoulder.

Plaintiff was advised by Defendants that they would place her in a sling, provide her with some pain killers. Plaintiff did not want to be released from the emergency room and requested an immediately consult with an orthopedic specialist. Defendants refused. When Defendants refused to treat Plaintiff and to stabilize her condition, Plaintiff requested to be transferred to a hospital that could treat and stabilize her injuries. Defendants refused.

MOUNTAIN VIEW HOSPITAL is a small local hospital. Within Las Vegas area, certainly within an ambulance ride just a few miles away, are two trauma centers that Plaintiff should have been transported to for care and treatment. The University Medical Center of Southern Nevada is a Level I Trauma Center and Sunrise Hospital & Medical Center is a Level II Adult Trauma Center. Both these hospitals are regional trauma centers designed to handle injuries like the one sustained by Plaintiff.

Proper stabilization for the injury that Plaintiff suffered is a orthopedic consult and open reduction surgery of the fracture [1] given the significant probability of this type of injury disrupting the vascular supply to the proximal humerus along with severe displacement. Blood disruption to the proximal humerus is substantially more probable in elderly woman: Plaintiff was 75 years old at the time of her injury. Vascular supply disruption to the proximal humerus causes necrosis of the bone resulting in bone death, failed healing and nonunions and displacement. Therefore the standard of care for stabilization for this type of injury is not a band-aid and pain medication, rather immediate orthopedic consult and surgical intervention. Defendants failed on both accounts and could have easily transferred Plaintiff to one of the regional Level I Trauma Centers like University Medical Center of Southern Nevada which would have easily stabilized and treated the Plaintiff.

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[1]. In instances of severe fractures like Plaintiff's it is usually the standard of care that an orthopedic surgeon perform a hemiarthroplasty.

Defendant files a Rule 12(b)(6) motion in an attempt to essentially get this court to not rule on the pleadings, rather to rule on what the defendants believes are the "facts" of the case. Defendants argument is more akin to a summary judgment, of course, without observing the procedural requirements of a formal motion for summary judgment. As discussed below the First Amended Complaint is properly plead and not subject to a 12(b)(6) motion to dismiss.

II. STATEMENT OF THE LAW

A. THE DEFENDANTS' MOTION TO DISMISS UNDER F.R.C.P. 12(B)(6) IS NOT WELL TAKEN

A Rule 12(b)(6) motion to dismiss "for failure to state a claim is viewed with disfavor and is rarely granted." See *Gilligan v. Jamco Develop. Corp.* (9th Cir. 1997) 108 F.3d 246, 249. Indeed, the Court in *Colle v. Brazos County, Texas* (5th Cir. 1993) 981 F.2d 237, 243, stated that challenges to "bare-bones pleadings" are doomed with respect to attack based on a failure to state a claim. Defendant's 12(b)(6) motion is not well taken as the allegations in the First Amended Complaint are sufficient under federal pleading requirements.

As for federal pleading requirements, Rule 8 requires a short and plain statement that is simple, concise and direct. Such notice pleading does not require allegations of fact constituting the claim for relief. The pleading need only give fair notice of the pleader's claim so that opposing parties can respond, undertake discovery and prepare for trial. See *Conley v. Gibson* (1957) 355 US 41, 47-48 and *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit* (1993)

507, U.S. 163. As for State claims, the manner in which state claims are raised is governed by the Federal Rules requiring only a short and plain statement under Rule 8. See _Taylor v. United States_ (9th Cir. 1987) 821 F2d 1428, 1433.

In ruling on a 12(b)(6) Motion, the court must decide whether the facts alleged, if true, would entitle plaintiff to some form of legal remedy and unless the answer is unequivocally "no," the motion must be denied. See _De la Cruz v. Tormey_ (9th Cir. 1978) 582 F.2d 45, 48.

Thus, a Rule 12(b)(6) dismissal is proper only where there is either a "lack of a cognizable legal theory" or "the absence of sufficient facts alleged under a cognizable legal theory." See _Ballistreri v. Pacifica Police Dept._ (9th Cir. 1990) 901 F.2d 696, 699 and _Graehling v. Village of Lombardi, III_ (7th Cir. 1995) 58 F.3d 295, 297 - wherein the court stated that "[A] suit should not be dismissed if it is possible to hypothesize facts, consistent with the complaint, that would make out a claim."

In resolving a Rule 12(b)(6) Motion, the court must (1) construe the Complaint in the light most favorable to the Plaintiff; (2) accept all well-pleaded factual allegations as true; and (3) determine whether the plaintiff can prove any set of the facts to support a claim that would merit relief. See _Cahill v. Liberty mut. Ins. Co._ (9th Cir. 1996) 80 F.3d 336, 337-338.

Given the pleading requirements, the allegations plead in the First Amended Complaint and the disfavored use of the 12(b)(6) motion, the court should deny the Defendants' motion as not well taken. Defendants are clearly placed on notice of the allegations and will have a fair opportunity to discover the facts supporting the allegations in discovery and, if they deem it necessary, test the facts via a Motion for Summary Judgment if they so chose at a later date.

B. PLAINTIFF'S FIRST CAUSE OF ACTION AS AGAINST DEFENDANTS, HEALTH CORP AND MOUNTAIN VIEW'S UNDER 42 U.S.C. § 1395DD *ET AL* (EMTALA) IS PROPERLY PLEAD AND NOT SUBJECT TO DISMISSAL

Interestingly, Defendants attempt to use a 12(b)(6) motion as a summary judgment motion without the requisite formality of a summary judgment motion. The issue under 12(b)(6) is whether the complaint fairly states a cause of action such that the defendant is on notice of Plaintiff's claims. As for the pleading requirements, Plaintiff has squarely set forth the necessary elements that Defendants violated EMTALA by failing to stabilize the Plaintiff, failing to transfer the Plaintiff and failing to request an on-call orthopedic consult. There are no requirements to specifically plead every fact giving rise to Plaintiff's claim – indeed to do so would in effect violate Rule 8 requirements. Moreover, Defendants' argument is factually based as if the defendant were arguing a summary judgment motion.

As it relates to pleading the requisite elements of an EMTALA claim, all Plaintiff is required to do plead is that: (1) Defendant is governed by 42 U.S.C. §1395dd *[See F.A.C. @ ¶28]*; (2) Plaintiff's medical condition was an acute medical injury requiring immediate medical attention *[See F.A.C. @ ¶29-¶30]*; (3) that Defendants created an physician patient relationship and initiate some type of treatment *[See F.A.C. @ ¶30-¶33]*; (4) Defendants failed to stabilize, or transfer, or request an on-call orthopedic consult *[See F.A.C. @ ¶30-¶33]*; and (4) that plaintiff was injured therefrom *[See F.A.C. @ ¶34-¶35]*.

Under EMTALA once a hospital's emergency department physician determines that the person seeking treatment has an emergency medical condition,[2] the hospital must provide either (1) staff and facilities to treat and stabilize the medical condition (including on-call specialty consults), or (2) transfer the individual to another facility. See 42 U.S.C. §1395dd(b)(1).

The EMTALA statute defines *stabilize* as:

> "To provide such medical treatment of the condition as may be necessary to assure, within reasonable medical probability, that no material deterioration of the condition is likely to result from or occur during the transfer of the individual from the facility...."
>
> See 42 U.S.C. §1395dd(e)(3)(A).

"Transfer," under EMTALA includes both "discharge" or "movement" to another facility. See 42 U.S.C. §1395dd(e)(4). An appropriate transfer is a transfer to a hospital that provides medical treatment which *minimizes* the *risks to the individual's health*. See 42 U.S.C. §1395dd(c)(2)(A). Where the hospital fails to stabilize, request a speciality consult, or properly transfer the patient, and the patient "suffers personal harm as a direct result of a participating hospital's violation ..." the hospital is liable under the private right of action clause of the Act. See 42 U.S.C. §1395dd(d)(2)(A).

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[2]. Defined in 42 U.S.C. §1395dd(1)(A).

Although this is not summary judgment, *some* of the salient facts are that on November 8, 2006 when Plaintiff was transported by ambulance to MOUNTAIN VIEW HOSPITAL for emergency care and treatment. Defendants MOUNTAIN VIEW HOSPITAL and HEALTH CORPORATION OF AMERICA, INC., advised Plaintiff she had a massive and serious right proximal humerus fracture.

Plaintiff was advised by Defendants that they would place her in a sling and provide her with some pain killers. Plaintiff did not want to be released from the emergency room and requested an immediately consult with an orthopedic specialist. Defendants refused. When Defendants refused to treat Plaintiff and to stabilize (pain killers and a sling do not stabilize a severely fractured and displaced bone – Defendants' alleged stabilization is akin to putting a Band-aid and giving Aspirin for internal bleeding) her condition, Plaintiff requested to be transferred to a hospital that could treat and stabilize her injuries. Defendants refused. Defendant requested an immediate orthopedic surgeon consult. Defendant refused to call an on-call orthopedic surgeon in violation of EMTALA. [3]

MOUNTAIN VIEW HOSPITAL is a small local hospital. Within the Las Vegas area, certainly within an ambulance ride from MOUNTAIN VIEW HOSPITAL, are two major trauma centers that Plaintiff should have been transported to for care and treatment. The University Medical Center of Southern Nevada is a Level I Trauma Center and Sunrise Hospital & Medical Center is a Level II Adult Trauma Center. Both these hospitals are major regional trauma centers designed to handle injuries like the one sustained by Plaintiff.

Proper stabilization for the injury that Plaintiff suffered is a orthopedic consult and open reduction surgery [4] of the fracture given the significant probability of this type of injury disrupting the vascular supply to the proximal humerus along with systemic displacement. Blood disruption to the proximal humerus is substantially more probable in elderly woman: Plaintiff was 75 years old at the time of her injury. Vascular supply disruption to the proximal humerus will cause necrosis of the bone resulting in bone death, failed healing, nonunions and continued displacement. Therefore the standard of care for stabilization for this type of injury is not a band-aid and pain medication, rather immediate orthopedic consult and surgical intervention. Defendants failed on both accounts and could have easily transferred Plaintiff to one of the regional Level I Trauma Centers like University Medical Center of Southern Nevada which could have easily stabilized and treated the Plaintiff or called an orthopedic surgeon for immediate intervention. Defendants utterly failed to comply resulting in Plaintiff's loss of use of her right arm.

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[3]. See 42 CFR §489.24(j)

[4]. Also see Footnote No. 1, above.

The pleading clearly puts the Defendant on notice under Rule 8 what the claims are and under 12(b)(6) the plaintiff has set forth, in a plain and short statement, that the Defendants have violated EMTALA. Defendants treatment of the 12(b)(6) motion as a summary judgment is premature and procedurally defective and should summarily be denied.

C. PLAINTIFF'S SECOND CAUSE OF ACTION AS AGAINST DEFENDANTS, HEALTH CORP AND MOUNTAIN VIEW'S FOR MEDICAL MALPRACTICE IS PROPERLY PLEAD AND NOT SUBJECT TO DISMISSAL

Defendants appear to intentionally misread ¶52 of the Plaintiff's First Amended Complaint to make an issue where none exists. In the Motion, Defendant contends that Plaintiff's First Amended Complaint states that plaintiff "[realized] she was harmed by or about April 4, 2007." (Motion @ p.8, ln. 23). However, Defendant misreads the paragraph which states:

> "52. Plaintiff, JOAN G. LOZOYA discovered, *sometime after* April 4, 2007 the personal injuries sustained were a proximate result of the Defendants' negligent conduct as described herein.."

Plaintiff was unaware of the Defendants' malpractice until a Physician's Assistant mentioned something regarding her original treatment in Nevada to Plaintiff in Mid-June of 2007 and Plaintiff then followed up with her physician in mid-July 2007. After Plaintiff followed up she was aware for the first time of anything that could be construed as wrongdoing by Defendants. Plaintiff then retained the firm of *Lozoya & Lozoya* in October of 2007. Counsel for Plaintiff then endeavored to investigate Plaintiff's claims. Plaintiff requested medical records from the Nevada Defendants. Plaintiff sent out California's Section 364 letter in early November 2007 to the California defendants. The Nevada records were produced, March 3, 2008 but the records did not include the X-rays films as requested or the report reading the X-ray films. [5] Thus, Plaintiff's counsel again requested these records and again demanded that the Defendants provide the X-ray films and the over read of the films. Defendant finally produced the X-ray CD a few weeks later.

In the interim Plaintiff filed the Complaint on the year anniversary of the injury in an abundance of causation. However, it was not until Mid-July of 2007 that Plaintiff had any idea that her then immobilized useless arm was related, in part, by the Nevada defendants' improper conduct.

Plaintiff concedes that under *NRS 41A.071* a complaint filed without an affidavit shall be dismissed without prejudice in a Nevada State Court proceeding. However, for purposes of *Erie*, such an issue is *procedural* in nature not substantive. See *Baird v. Celis* (ND GA 1999) 41 F.Supp.2d 1358, 1360-1362 - holding malpractice affidavit does not apply in federal courts as they violate FRCP's notice pleading requirements. Moreover, even dismissing the Second Cause of Action of the First Amended Complaint does not barr the Plaintiff from refiling the Complaint as the statute of limitations has not run under *NRS 41A.097*. Thus, as a procedural matter, if under *NRS 41A.071* the Court is going to dismiss the Second Cause of Action of the First Amended Complaint as to Health Corporation of America, Inc. and Mountain View

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[5]. As a result of defendant not producing the medical records, Plaintiff requested an extension to serve the Summons and First Amended Complaint that was granted by the Court. *See docket No. #6.*

Hospital, the Plaintiff has the affidavit under *NRS 41A.071* and can file it if the Court so requires with the new complaint. Thus, if the Plaintiff files the new complaint again pleading the Second Cause of Action of the First Amended Complaint as to Health Corporation of America, Inc. and Mountain View Hospital, Plaintiff will be forced to consolidate the two actions and we will be right back were we started but with many attorney hours and court time expended. [6]

The Defendants, Rule 12(B)(6) motion to dismiss the Second Cause of Action of the First Amended Complaint as to Health Corporation of America, Inc. and Mountain View Hospital is not well taken. Not only has the statute of limitations not yet run, but dismissing the Second Cause of Action of the First Amended Complaint as to Health Corporation of America, Inc. and Mountain View Hospital will only delay the matter. Plaintiff can file the necessary affidavit within one week of the June 2, 2008 hearing if not earlier if requested by the court to do so.

CONCLUSION

For the reasons stated above, the Defendant Health Corporation of America, Inc. and Mountain View Hospital's Motion to Dismiss should be denied.

As to the First Cause of Action for violation of EMTALA there is nothing defective with the First Cause of Action requiring this court to grant a motion to dismiss under Rule 12(b)(6) for "failing to state a cause of action." Defendants are essentially trying to argue a summary judgment motion. Moreover, the motion should be denied as the facts alleged in the First Cause of Action squarely put Defendants on notice of the claim and Defendants can clearly respond and undertake discovery. See *Conley v. Gibson* (1957) 355 US 41, 47-48 and *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit* (1993) 507, U.S. 163 and *De la Cruz v.*

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[6]. The language of the complaint does not show an absolute barr and therefore Rule 12(b)(6) is not applicable-- Rather summary judgment is the proper procedural motion to test any statute of limitations theory that defendant believes might be appropriate for adjudication. See *Supermail Cargo, Inc. v. United States* (9th Cir. 1995) 68 F.3d 1204, 1206 and *Avco Corp. v. Precision Air Parts, Inc*. (11th Cir. 1982) 676 F.2d 494, 495.

Tormey (9th Cir. 1978) 582 F.2d 45, 48.

As for the Second Cause of Action of the First Amended Complaint as to Health Corporation of America, Inc. and Mountain View Hospital, the Motion to dismiss is not well taken. Defendant tries to force language in the complaint that is not there. Not only has the statute of limitations not yet run, but dismissing the Second Cause of Action of the First Amended Complaint as to Health Corporation of America, Inc. and Mountain View Hospital will only delay the matter and violates *Erie* principals as FRCP controls the procedural pleading aspects of these claims. Plaintiff can file the necessary affidavit within one week of the June 2, 2008 hearing if not earlier if requested by the court to do so.

If the court believes that either the First or Second Cause of Action needs to be amended or replead, the Plaintiff would request leave to amend as Plaintiff can certainly clarify any issue the court believes maybe ambiguous in the First Amended Complaint. See FRCP 15(a) and *Allen v. Beverly Hills* (9th Cir. 1990) 911 F.2d 367, 373.

Respectfully submitted.

Dated: May 15, 2008 LAW OFFICES OF LOZOYA & LOZOYA

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